72-1061

IN THE

Supreme Court of the United States

October Term, 1972

No.

WINDWARD SHIPPING (LONDON) LIMITED, *et al.*,
Petitioners,

v.

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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Petitioners WINDWARD SHIPPING (LONDON) LIMITED, SPS BULKCARRIERS CORP., and WESTWIND AFRICA LINE, LTD. pray that a writ of certiorari issue to review the judgment of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas, entered on May 17, 1972.[1]

[1] Respondents are

American Radio Association, AFL-CIO;

International Organization of Master Mates and Pilots, AFL-CIO;

National Marine Engineers Beneficial Association, AFL-CIO;

National Maritime Union of America, AFL-CIO;

Radio Officers Union of the United Telegraph Workers, AFL-CIO; and

Seafarers International Union of North America, AFL-CIO.

Opinions Below

The order of the Supreme Court of Texas, dated October 4, 1972, refusing petitioners' application for a writ of error, which was entered without opinion, is set forth at pages D1-2 of the Appendix.

The opinion of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas, dated May 17, 1972, is reported at 482 S. W. 2d 675 and is set forth at pages B1-13 of the Appendix.

The unreported opinion of the District Court of Harris County, 164th Judicial District of Texas, dated December 10, 1971, is set forth at pages A1-3 of the Appendix.

Jurisdiction

The judgment of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas issued and was entered on May 17, 1972 (Appendix pages B1-13). A motion for a rehearing was denied by order dated June 14, 1972 (Appendix pages C1-2). Petitioners' application to the Supreme Court of Texas for a writ of error was refused by order dated October 4, 1972 (Appendix pages D1-2). Petitioners' application for an extension of time in which to file the present petition for writ of certiorari was granted by Mr. Justice Powell by order dated December 8, 1972, which order extended the time for filing of this petition to and including February 1, 1973. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

Question Presented

Whether the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas, erred in applying in the present case the rule stated in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), that "[w]hen an activity is arguably subject to § 7 or § 8 of the Act (The Labor Management Relations Act, as amended) the States as well as the federal courts, must defer to the exclusive competence of the National Labor Relations Board . . ." (*id.* at 245) and in determining under that rule that the Labor Management Relations Act, as amended, 29 U. S. C. § 141, *et seq.* ("the Labor Act") arguably applies to a dispute between American unions and foreign owned, foreign flag ships manned by foreign crews represented by foreign unions so as to preempt the jurisdiction of a state court over an action seeking injunctive relief against picketing by the American unions, a stated purpose of which was to protest allegedly substandard wages and working conditions on board such ships and an intended and actual effect of which was to cause longshoremen and others to refuse to cross the picket lines and to refuse to perform services for the ships.

Statutes Involved

Petitioners contend that the jurisdictional scope of the Labor Management Relations Act, as amended, 61 Stat. 136 (1947), 29 U. S. C. §§ 141-187, does not extend to the foreign ships here involved or to the conduct of parties to disputes which relate to the internal affairs of such foreign ships. The answer to this question cannot be obtained by reference to any particular section of the Act which literally construed would extend to govern the relations between labor and management in all countries. By way of illustration sections 141, 151, 157 and 158 are reprinted in Appendix F.

Statement of the Case

The Parties

Petitioner Windward Shipping (London) Limited is a British corporation and is managing agent of the SS THEOMANA (O.R. 1, page 109).[2] Petitioner SPS Bulk-

[2] All citations are to the original record transmitted by the Court of Civil Appeals, 14th Supreme Judicial District of Texas, to the Supreme Court of the United States pursuant to Rule 21 of the Supreme Court Rules. The fourteen parts of the original record are:

1. Transcript
2. Statement of facts, Vol. 1
2A. Statement of facts, Vol. 2
2B. Statement of facts, Vol. 3
2C. Statement of facts, Vol. 4
3. Certified copy of appellants' brief
4. Certified copy of stipulation
5. Certified copy of appellees' brief
6. Certified copy of amicus curiae brief
7. Certified copy of 14th Court of Civil Appeals' opinion
8. Certified copy of judgment recorded in Vol. 1, page 373, Minutes, 14th Court of Civil Appeals
9. Certified copy of appellants' motion for rehearing
10. Certified copy of supplemental brief in support of appellants' motion for hearing
11. Certified copy of order of 14th Court of Civil Appeals overruling appellants' motion for rehearing
12. Certified copy of application for writ of error
13. Certified copy of respondents' reply to petitioners' application for writ of error
14. Certified copy of order of Supreme Court of State of Texas refusing application for writ of error.

Citations are to the part of the record and to the page number within that part. Thus, a citation to page 10 of part 1 ("Transcript") is "O.R. 1, page 10" and a citation to page 20 of part 2 ("Statement of facts, Vol. 1") is "O.R. 2, page 20."

carriers Corp. is a Liberian corporation and owner of the SS THEOMANA (O.R. 1, pages 108-109). Petitioner Westwind Africa Line, Ltd. is a Liberian corporation and owner of the SS NORTHWIND (O.R. 1, page 108). Respondents are American unions representing licensed and unlicensed American seamen (O.R. 1, pages 7, 13).

The Vessels and Their Crews

The vessels SS THEOMANA and SS NORTHWIND are registered under the laws of Liberia and fly the Liberian flag (O.R. 1, page 108). The SS THEOMANA is a bulk carrier carrying bulk cargo and general cargo. The SS NORTHWIND is a dry cargo vessel (O.R. 1, page 109). The vessels are engaged in carrying cargo in international trade and do not carry cargo between United States ports (O.R. 1, page 108). Officers and crews of the vessels are made up entirely of foreign nationals, who are represented by foreign unions (O.R. 1, pages 111, 115). The wages and other terms and conditions of employment of the crew members are covered by a collective bargaining agreement with the Pan Hellenic Seamen's Federation except that certain members of the crews are covered by the Indonesia Seafarers' contract or the Sierra Leona Seamen's Union contract (O.R. 1, page 111; O.R. 2, page 17). None of the officers or crew members on the vessels is represented by any of the respondents (O.R. 2, page 16).

The Picketing and Its Consequences

On October 23, 1971, the SS THEOMANA docked in the Port of Houston, Texas to load a cargo for Bandar Shahpur, Iran. Loading of the vessel began the following day and continued until the evening of October 28 when members of respondent unions began picketing at the gangway of the SS THEOMANA after which the longshoremen refused to cross the picket line and the loading could not be completed (O.R. 2, pages 47-50; O.R. 2A,

page 70). The SS NORTHWIND docked at Houston on the morning of October 29 to off-load a part cargo of coffee and to load a cargo of wheat for Nigeria. Loading began within a few hours of the SS NORTHWIND's arrival and continued until afternoon, when members of respondent unions arrived at the gangway and began to picket. Longshoremen thereafter refused to cross the picket line and the ship was prevented from continuing to load the wheat or to off-load the coffee (O.R. 2, pages 26-31). The ship was at that stage in an unseaworthy condition by reason of being only partly loaded and could not sail (O.R. 2, pages 31-32).

At a hearing on November 9, 1971, various stipulations were made to the effect that the unions would permit certain limited work to be done for the ships so that they could be made seaworthy and able to sail, that the ships intended to call at United States ports in the future and that if they did they would be picketed again by the respondents (O.R. 2A, pages 57-60).

The Purpose of the Picketing and the Nature of Respondents' Dispute With the Ships of the Petitioners

The picketing was carried on jointly by members of the respondent unions. It was intended to and did have the effect of causing longshoremen and others engaged in unloading and loading the vessels to refuse to cross the picket lines and thus to prevent the completion of the unloading and loading of the vessels (O.R. 2, page 22; O.R. 2B, page 153; O.R. 1, pages 109-110).

The pickets carried picket signs which read "Attention to the public—The wages and benefits paid seamen aboard the vessel THEOMANA (NORTHWIND) are substandard to those of American seamen. . . . We have no dispute with any other vessel on this site". (The full legend on the signs is set out at O.R. 1, pages 109-110).

The pickets also carried leaflets which read in part: "To the Public—American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen. . . . Our dispute here is limited to the vessel picketed at this site, the SS ————————." (The full contents of the leaflet are set out at O.R. 1, page 112).

The pickets were instructed in advance by the respondent unions and the attorneys representing them not to reply to any questions concerning the purpose of the picketing but merely to carry the signs and pass out the leaflets. These instructions were followed and the picketing was peaceful (O.R. 2B, pages 181, 187, 197, 198-200, 208, 209).

A union spokesman testified at the trial that the union's object was to get the foreign flag owners to increase the wages and improve the working conditions of the crews on the foreign flag ships so that American operators employing more highly paid American seamen would be more competitive with the foreign ships (O.R. 2B, pages 190-191). Another union spokesman testified that he agreed with the statement that if the foreign flag operators would realize that they should pay their crews the same wages and benefits which American seamen receive and cause their ships to have American seamen's standard working conditions, then the respondent unions would have accomplished their goal and would cease their activities (O.R. 2B, pages 158-159).

Notwithstanding the purposes and goals of the picketing, there is no evidence in the record or allegation by the respondent unions that the crews on board the vessels were not being paid in accordance with the contractual wages and benefits due to them under the various wage agreements signed with the foreign unions representing them. Moreover, there is no evidence that any of the union represen-

tatives contacted the petitioners with a request that any of the unions be recognized as the collective bargaining representatives of the crews on the ships (O.R. 2A, page 65).

There was considerable testimony introduced into the record by the respondents to the effect that foreign ships enjoy a cost advantage over American ships because the wage levels on foreign ships are lower than those on American ships, that this tends to make American ships uncompetitive with foreign ships and that over the years there has been a substantial decline in the number of American ships at sea and correspondingly in the number of jobs available to American seamen (O.R. 2B, pages 117-125, 189; O.R. 2C, pages 226, 227). There was also considerable testimony and evidence offered by the unions to the effect that the picketing was "publicity" picketing intended to protect the jobs of American seamen by calling to the attention of the public the loss of American jobs to foreign ships employing foreign seamen at wages which are "substandard" when compared to American wages, to request public support and cooperation and to ask the public to patronize American ships (O.R. 2B, pages 142-143, 150, 152, 160, 161; O.R. 1, pages 109-110).

Nevertheless the fact remains that the union action took the form of picketing the ships and handing out leaflets at shipside with the intention and expectation of causing longshoremen and others who were to perform services for the ships not to cross the picket lines and not to perform such services. In this respect the picketing was completely successful because the longshoremen did not cross the picket lines and the loading and unloading of the ships could not be accomplished (O.R. 2, pages 26-30, 47-50; O.R. 2B, pages 153, 163). Moreover, the only evidence in the record as to what petitioners could have done to cause the pickets to be withdrawn is that peti-

tioners would have had to increase wages and benefits paid to the foreign crews on their ships to the same level of wages and benefits received by American seamen and give them the same working conditions as American seamen (O.R. 2B, page 158).

The Litigation and the Manner in Which the Federal Question Was Raised

On October 30, 1971, petitioners Windward Shipping (London) Limited and SPS Bulkcarriers Corp. filed an action in the District Court of Harris County, Texas, 164th Judicial District, seeking temporary and permanent injunctive relief against respondents' picketing. That same day petitioner Westwind Africa Line, Ltd. filed a similar action in the same court. On November 8, 1971, petitioners filed amended complaints in their respective actions, alleging *inter alia* that the jurisdiction of the Texas courts was not pre-empted, and that the picketing by respondents was in violation of Article 5154d, Section 4, Texas Revised Civil Statutes, that such picketing was an intentional tort, that petitioners had no adequate remedy at law and that petitioners were suffering and would suffer irreparable injury. Respondents filed an answer alleging, *inter alia*, in paragraph VII that the matters alleged by the petitioners in their petitions were within the jurisdiction of the National Labor Relations Board ("the NLRB") so that the Texas court was without jurisdiction over the cause (Appendix E).

The cases, consolidated by agreement of the parties, came on for hearing on November 8, 1971. On that day and the following day, the hearing proceeded on the application for a temporary injunction. By agreement of the parties, the hearing was recessed until November 29, 1971, at which time the causes were tried on their merits as applications for permanent injunctive relief. This trial on the merits was agreed to by the parties as part of a

stipulation wherein it was also agreed that the unions would limit their picketing of the THEOMANA and NORTHWIND so as to make possible the doing of work necessary to permit the vessels to sail, without loading their full intended cargoes, that the vessels intended to return to the Port of Houston or some other United States port in the future, and that the unions would again picket the vessels if and when they returned to the United States (O.R. 2A, pages 57-60). On December 10, 1971, the District Court entered a judgment of dismissal on the ground that the issues were arguably subject to the exclusive jurisdiction of the NLRB and that the Texas court's jurisdiction was pre-empted (Appendix, pages A1-3). The District Court did not discuss any other issues in its opinion. Petitioners appealed to the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas. The Republic of Liberia filed a motion for leave to appear as *amicus curiae* which was granted by the Court of Civil Appeals on April 5, 1972, and the brief of the Republic of Liberia was ordered accepted by the Court. The Court of Civil Appeals affirmed the judgment of the District Court in an opinion dated May 17, 1972 on the same pre-emption grounds specified by the District Court, and likewise did not discuss other issues (Appendix, pages B1-13). Petitioners moved for a rehearing which was denied on June 14, 1972 (Appendix, pages C1-2). Thereafter, petitioners filed an application to the Supreme Court of Texas for a writ of error which was refused on October 4, 1972 (Appendix, pages D1-2). Point I of petitioners' application to the Supreme Court of Texas was that the Court of Civil Appeals erred in applying the pre-emption doctrine (O.R. 12, page 2).[3]

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[3] On October 29, 1971, petitioner Windward Shipping (London) Limited filed a charge against respondent unions with the NLRB. This charge alleged illegal secondary picketing by the unions in violation of Section 8(b)(4)(B) of the Labor Act. The charge was withdrawn voluntarily on November 8, 1971.

Reasons for Granting the Writ

The Texas Court of Civil Appeals has disregarded or misconstrued controlling decisions of this Court on the question of whether or not the Labor Act is applicable to disputes between American unions and foreign owned, foreign flag, foreign crewed ships, a question which this Court has already recognized to be one of importance involving delicate questions of relations between this country and other sovereign powers. On the reasoning of the Texas court any protest picketing by American unions of foreign ships would be arguably subject to the exclusive jurisdiction of the NLRB and thus pre-empted notwithstanding the plain language of this Court's decisions that the Labor Act does not apply to foreign ships or to the conduct of parties to disputes which relate to the internal affairs of such ships. The petitioners, who have been threatened with renewed picketing if their ships again call at United States ports, as well as other foreign shipowners who may be subjected to picketing, would be faced with the futile prospect of seeking relief under an act which this Court has held does not apply to them.

Benz v. *Compania Naviera Hidalgo,* 353 U. S. 138 (1957); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U. S. 10 (1963); *Incres Steamship Co.* v. *International Maritime Workers Union,* 372 U. S. 24 (1963) and *International Longshoremen's Association, Local 1416, AFL-CIO* v. *Ariadne Shipping Co., Ltd.,* 397 U. S. 195 (1970) hold that the Labor Act does not apply to the internal affairs of foreign ships or to disputes which relate to the internal affairs of foreign ships and thus that no jurisdiction of the NLRB exists which would pre-empt the jurisdiction of state courts to consider such disputes. In this case the facts are straightforward in that the defendant unions were picketing the foreign ships to protest allegedly substandard wages and working con-

ditions of the crews on the ships and, as was stated by union witnesses, the unions' interest was in getting the foreign ship operators to increase the wages and benefits of the crews to American levels so that American ships would be more competitive from a cost point of view. Wages and benefits paid to the crew of a foreign ship are at the very heart of its internal affairs.

The application by the Texas court of the "arguably subject" rule stated in *San Diego Building Trades Council* v. *Garmon, supra,* was singularly inappropriate since the inapplicability of the Labor Act to disputes relating to the internal affairs of foreign ships has been clearly determined by this Court and hence there is no "arguability". There is no reason to defer to the NLRB on the issue of whether particular conduct is either protected or prohibited under the Labor Act unless and until it is determined that the Labor Act is applicable. As was pointed out in the concurring opinion in *International Longshoremen's Association* v. *Ariadne Shipping Co., supra,* there is no effective mechanism whereby a foreign shipowner can obtain a determination from the NLRB as to the applicability or inapplicability of the Labor Act or the protected or unprotected status of a union's conduct.

ARGUMENT

The Texas Court failed to apply the law expressed in controlling decisions of this Court on the inapplicability of the Labor Act in disputes involving foreign ships.

The Texas Court of Civil Appeals reviewed the cases of *Benz* v. *Compania Naviera Hidalgo, supra; McCulloch* v. *Sociedad Nacional, supra; Incres Steamship Co.* v. *International Maritime Workers Union, supra; International Longshoremen's Association* v. *Ariadne Steamship*

Co., supra; and *Marine Cooks and Stewards* v. *Panama S.S. Co.*, 362 U. S. 365 (1960) and concluded from them that if picketing intervenes in an alien seamen's strike or strives to organize the foreign crews of a foreign ship, then the picketing is concerned with matters not "in commerce" and is thus not governed by the Labor Act, but if it is picketing which protests the level of wages and the working conditions on such ships, its "validity" is suggested by this Court's holding in *Marine Cooks and Stewards* v. *Panama S.S. Co., supra,* and "[i]t is, at least arguably, a protected activity under section 7 of the LMRA". Appendix page B 13; 482 S. W. 2d at 682.

The Texas court based its decision on its view that:

> [t]here is still no clear statement of the Supreme Court's position as to whether the NLRB has jurisdiction of, as here, picketing by American *seamen* to protest substandard wages and conditions on foreign vessels. (emphasis in original) Appendix page B 11; 482 S. W. 2d at 681.

A. Review of the Supreme Court Decisions on Preemption in Disputes Involving Foreign Ships.

(1) The *Benz* case, 353 U. S. 138 (1957), grew out of a dispute between a foreign ship and its foreign crew over wages and working conditions. An American union picketed the ship with the purpose of compelling the shipowner to re-employ striking crew members at more favorable wage rates than those agreed upon in the ship's articles (353 U. S. at 141). This Court stated that the question to be decided was whether the Labor Act applies to a controversy involving damages resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is temporarily in an American port (353 U. S. at 139) and held that it does not. In its decision this Court stated that its study of the Labor Act left it convinced that Congress did

not fashion the Labor Act to resolve labor disputes between nationals of other countries and stated:

> The whole background of the Act is concerned with industrial strife between American employers and employees. 353 U. S. at 143, 144.

As the controversy was not governed by the Labor Act, because it involved a dispute over wages paid to foreign seamen on a foreign ship, the picketing by the American union was held by this Court not to be governed by the Labor Act.

(2) The case of *McCulloch* v. *Sociedad Nacional,* 372 U. S. 10 (1963), arose in the context of a complaint seeking to bar the NLRB from conducting a representation election on a foreign ship, and this Court stated that the question to be determined was ". . . whether the Act as written was intended to have any application to foreign registered vessels employing alien seamen." 372 U. S. at 19. This Court held ". . . we find no basis for a construction which would exert United States jurisdiction over and apply its laws to the internal management and affairs of the vessels. . . ." 372 U. S. at 20.

(3) The *Incres* case, 372 U. S. 24 (1963), decided on the same day as *McCulloch* v. *Sociedad Nacional, supra,* arose in the context of a complaint having been filed in a state court seeking to enjoin an American union from picketing foreign ships manned by foreign crews and from encouraging the crews to refrain from working the vessels. The Court referred to its decision in *McCulloch* v. *Sociedad Nacional, supra,* stating:

> In that case we were immediately concerned with the Board's jurisdiction to direct an election, holding that the Act had no application to the operations of foreign flag ships employing alien crews. Therefore, no different result as to Board jurisdiction

follows from the fact that our immediate concern here is the picketing of a foreign flag ship by an American union. 372 U. S. at 27.

Again, we deem it highly relevant that this Court, having decided in *Benz, supra,* that the Labor Act did not apply to the maritime operations of foreign flag ships employing foreign seamen, stated clearly that it therefore followed that the Labor Act did not apply to picketing of the ships which was related to the employer-employee relationships on such ships.

(4) The most recent decision by this Court on the question of pre-emption and foreign flag ships, *International Longshoremen's Association* v. *Ariadne Shipping Co.,* 397 U. S. 195 (1970), arose in the context of a complaint filed in a state court seeking to enjoin picketing by an American union of a foreign ship employing foreign seamen. The union was protesting that longshoremen's work in United States ports was being done under substandard wage conditions. This Court stated that the dispute centered around wages to be paid by the foreign ship to American residents who were temporary employees employed to unload the ship. This Court stated that the critical question to be determined was, "... whether the longshore activities of such American residents were within the 'maritime operations of foreign flag ships' which *McCulloch, Incres,* and *Benz* found to be beyond the scope of the Act." 397 U. S. at 200. The Court held that "The American longshoremen's short-term, irregular and casual connection with the respective vessels plainly belied any involvement on their part with the ships' 'internal discipline and order' " *id.* at 200, and that the picketing was thus, under the rule of *San Diego Building Trades Council* v. *Garmon, supra,* " 'arguably subject' to regulation under § 7 or § 8 of the Act" *id.* at 200. The Court expressly reserved from the decision situations where the longshore work is carried out

by a ship's foreign crew pursuant to foreign articles. *id.* at 199,n.4. Even more importantly, the case in no way suggests that protest picketing related to the wage levels of the crew for shipboard duties as in the case at bar would be deemed not to involve the internal affairs of the ship.

B. The Texas Court Erred in Interpreting the Controlling Decisions of This Court and in Relying on Certain Decisions of Lower Courts.

(1) The Texas court held that the picketing by the American unions fell into the category of "area standards" picketing held to be arguably protected by Section 7 of the Labor Act in *International Longshoremen's Association* v. *Ariadne Shipping Co., supra* (Appendix, page B 7, 482 S. W. 2d 679).

In holding that the picketing in the case at bar was arguably protected, notwithstanding that it involved a dispute with a foreign ship, the Texas court relied on the cases of *South Georgia Co., Ltd.* v. *Marine Engineers Beneficial Ass'n.*, 44 CCH Lab. Cas. 26,269 (La. Dist. Ct. 1961) and *Ex Parte George*, 163 Tex. 103, 358 S. W. 2d 590, vacated 371 U. S. 72 (1962), on remand 364 S. W. 2d 189 (Tex. 1963) as well as *Ariadne, supra.* Both *South Georgia* and *Ex Parte George* were decided prior to the Supreme Court's decisions in *McCulloch* and *Incres, supra.* Thus the *South Georgia* case held that the "commerce" requirement of the Labor Act was satisfied by the fact that the foreign vessels picketed in that case were trading in and out of United States ports whereas *Incres* held to the contrary that ". . . maritime operations of foreign flag ships employing alien seamen are not in 'commerce' within the meaning of § 2(6), 29 U. S. C. § 152(6)." 372 U. S. 24, at 27. *Ex Parte George, supra,* had nothing to

do with picketing of foreign ships. It involved a purely domestic dispute between an American union and an American company. We respectfully submit that the Texas court's reliance on these cases was entirely misplaced.

The Texas court in its opinion described this Court's opinion in *International Longshoremen's Association* v. *Ariadne Shipping Co.*, 397 U. S. 195 (1970) with evident care but then proceeded to the conclusion that, as this Court had held in that case that the Labor Act governed protest picketing regarding substandard wages paid to American longshoremen employed temporarily to unload a foreign vessel, it therefore followed that the Labor Act would apply to protest picketing regarding substandard wages paid to foreign seamen employed on the vessel. We respectfully submit that this Court took pains to point out that the reason why the Labor Act did apply in *Ariadne* was precisely because the protest picketing involved allegedly substandard wages paid to the American longshoremen rather than the wages paid to the foreign crew and specifically reserved from its decision the situation of picketing protesting substandard wages paid to the foreign crew because of the direct involvement of the crew with the internal order and discipline of the ship. See 397 U. S. 195 at 199, 200.

We submit that *Ariadne* is compelling authority that, whereas peaceful picketing protesting substandard wages of American longshoremen employed on an occasional basis to unload a foreign ship is governed by the Labor Act because "The American longshoremen's short-term, irregular and casual connection with the respective vessels plainly belied any involvement on their part with the ships' 'internal discipline and order' " 397 U. S. 195 at 200, the exact opposite conclusion must follow if the picketing involves protest of alleged substandard wages paid to

the foreign crew of a foreign vessel whose connection with the vessel is neither short-term, irregular nor casual and who are plainly involved in the internal discipline and order of the vessel.

(2) The Texas court purported to distinguish *Benz, supra*, on the basis of *Marine Cooks and Stewards, supra*, wherein this Court held that picketing by an American union of a foreign flag ship to protest substandard wages constituted a "labor dispute" within the meaning of the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. § 101 *et seq.* and that Federal courts were by reason of this Act without jurisdiction to grant an injunction against the picketing. This Court in *Marine Cooks* pointed out that different considerations pertained in construing the applicability of the Norris-LaGuardia Act than were pertinent in construing the Labor Act and said that the decision in *Benz* on the applicability of the Labor Act in no way justified the inference that the Federal courts were empowered to issue injunctions in labor disputes involving foreign flag ships (see 362 U. S. at 369).

The Court in *Marine Cooks* rejected petitioner's argument to the effect that if a "labor dispute" under the Norris-LaGuardia Act was involved, nevertheless the Federal court should have jurisdiction to issue an injunction because the picketing involved an unlawful interference in the internal economy of a foreign vessel, stating:

> Nor does the language of the Norris-LaGuardia Act leave room to hold that jurisdiction it denies a District Court to issue a particular type of restraining order can be restored to it by a finding that the nonenjoinable conduct may "interfere in the internal economy of a vessel registered under the flag of a friendly foreign power." 362 U. S. at 371.

Then, in a footnote which was plainly dictum, the Court went on to say that the American union was not interested in the internal economy of the ship but rather in preserving job opportunities for themselves and concluded that "the dispute was domestic". We submit that while the conclusion that the dispute was "domestic" may have been relevant for Norris-LaGuardia Act purposes it is irrelevant for Labor Act purposes. Indeed, we find the statement that the unions "were not interested in the internal economy of the ship" when they were protesting the level of wages and working conditions on the ship rather hard to follow.

The record in the case at bar makes it abundantly clear that the unions intended in the present picketing situation to force foreign ships to pay wages as high as those paid on American ships, so that American ships would be more competitive at which time the American unions would cease their picketing activities against foreign ships (O.R. 2B, page 158). Indeed one of the union representatives testified that the unions' interest in conducting the picketing in the case at bar was to get the foreign flag shipowners to increase the wages and improve the working conditions of the crews so that the American ships would be more competitive from a cost point of view and so there would be more jobs for American seamen (O.R. 2B, pages 189-191). Any argument that such picketing is not related to the internal economy of the ships which were picketed would be, we submit, completely untenable.

Lest there might have been any latent doubt that the decision in *Marine Cooks* somehow limited this Court's earlier decision in *Benz*, this Court in *McCulloch*, *supra*,

stated categorically that the *Marine Cooks* case should not be taken as any limitation of the earlier *Benz* holding (372 U. S. at 18). Thus, we submit that the Texas court erred in purporting to apply the rationale of this Court in *Marine Cooks* to a question of the applicability of the Labor Act.

There remains to be discussed the reliance by the Texas court on the related United States Court of Appeals cases of *Madden* v. *Grain Elevator, Flour and Feed Workers, I. L. A., Local 418*, 334 F. 2d 1014 (7th Cir. 1964), *cert. denied* 379 U. S. 967 (1965), and *Grain Elevator, Flour and Feed Workers, I.L.A., Local 418* v. *NLRB*, 376 F. 2d 774 (D. C. Cir.), *cert. denied* 389 U. S. 932 (1967). In these cases the union was urging that *Incres* precluded the granting of relief sought by the NLRB on a charge filed by an American company for violation by the union of the secondary boycott provisions of the Labor Act,[4] in a situation where the union, which had a dispute with a foreign shipowner, imposed an illegal secondary boycott on the American company. The Courts of Appeals correctly held that the *Incres* case did not bar an American employer from seeking relief through the NLRB against a boycott by an American union involving employees working in a domestic plant of the American employer (334 F. 2d at 1019, 1020).

We have no quarrel with the decisions in these cases, but they offer no basis whatsoever for limiting the *Incres* decision in the fashion which the Texas court concludes that they do.

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[4] § 8(b)(4)(i) and (ii)(B) of the Act, 29 U. S. C. § 158(b)(4)(i) and (ii)(B).

Conclusion

We submit that where an American union is involved in a dispute with a foreign shipowner which relates to the internal affairs of a foreign ship, as is undeniably the case here, the Labor Act is not applicable to govern the conduct of either party to the dispute and no activity of either party is either prohibited or protected by that Act, and the parties to such dispute are free to seek whatever relief, if any, may be available to them in the state courts. As pointed out in *Benz, supra,* "The whole background of the Act is concerned with industrial strife between American employers and employees." 353 U. S. at 143, 144. We urge that this petition for a writ of certiorari be granted.

Respectfully submitted,

Breck P. McAllister,
James V. Hayes,
Counsel for Petitioners.

Robert S. Ogden, Jr.
Vernon E. Vig
Joseph E. Fortenberry
Donovan Leisure Newton & Irvine
Of Counsel.

APPENDIX A

JUDGMENT, INCLUDING NOTICE OF APPEAL. FILED: December 9, 1971. RAY HARDY, District Clerk, Harris County, Texas. By J. Wright, Deputy. JUDGMENT ENTERED: Volume 829, Page 94, General Minutes District & Domestic Relations Courts, in and for Harris County, Texas.

IN THE

DISTRICT COURT OF HARRIS COUNTY, TEXAS

164TH JUDICIAL DISTRICT OF TEXAS

No. 889,002

WINDWARD SHIPPING (LONDON) LIMITED & SPS BULKCARRIERS CORP.

VS.

AMERICAN RADIO ASSOCIATION AFL-CIO, et al

No. 889,003

(Consolidated Under No. 889,002)

WESTWIND AFRICA LINE, LTD.

VS.

AMERICAN RADIO ASSOCIATION AFL-CIO, et al

JUDGMENT

The above cases having been consolidated by agreement of the parties, came on for hearing on the 8th day of

Appendix A

November, 1971, when came the Plaintiffs by their attorneys of record and also came the Defendants by their attorneys of record and all parties announced ready for trial on the Plaintiffs' Motion For Temporary Injunction; and the trial having proceeded on November 8th and 9th, 1971, on Plaintiffs' Application For Temporary Injunction, the hearing was then recessed by agreement of the parties and approval of the Court until November 29, 1971, at which time the hearing reconvened; and at said time all parties announced that they had agreed to request the Court to proceed to hear the case on its merits to final decision. Thereupon, the case was continued on trial on the Plaintiffs' Application For Permanent Injunction as prayed for in their amended petition until November 30, 1971, when all parties rested and the case was taken under advisement by the Court with permission granted to all parties to file written briefs.

After consideration and study of the evidence, stipulations of the parties and the briefs filed, the Court is of the opinion and so finds that the issues raised in these consolidated cases are arguably within the jurisdiction of the National Labor Relations Board and that for such reason are pre-empted by the Board and this Court is without jurisdiction to proceed further.

It is accordingly ORDERED, ADJUDGED and DECREED that these consolidated causes be and they are hereby DISMISSED.

It is further ORDERED, ADJUDGED and DECREED that all taxable costs of Court incurred herein be taxed against the Plaintiffs.

To all of which the Plaintiffs and each of them in open Court duly excepted and gave notice of appeal to the Court of Civil Appeals of the State of Texas.

Appendix A

ENTER this 10th day of December, 1971.

WARREN P. CUNNINGHAM
Judge Presiding

APPROVED AS TO FORM:

BEN L. REYNOLDS
W. D. DEAKINS, JR.
Attorneys for Plaintiffs
Windward Shipping (London)
Limited & SPS Bulkcarriers

W. D. DEAKINS, JR.
Attorney for Plaintiff
Westwind Africa Line, Ltd.

W. A. COMBS
Attorney for Defendants

HERMAN WRIGHT
BERTRAM PERKEL
Attorneys for Defendants

APPENDIX B

COURT OF CIVIL APPEALS

FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

AFFIRMED, and Opinion filed May 17, 1972.

No. 635

WINDWARD SHIPPING (LONDON) LIMITED, et al,

Appellants

VS.

AMERICAN RADIO ASSOCIATION AFL-CIO, et al,

Appellees

Appeal from 164th District Court of Harris County

In October of 1971 the cargo vessels Northwind and Theomana, both of Liberian registry, were docked at the Port of Houston for the purpose of loading and unloading cargo. American Radio Association, AFL-CIO and five other deep sea maritime unions, acting in concert, established picket lines which longshoremen and other workmen would not cross to service such vessels. The owners of the vessels filed suit in the district court in Harris County to enjoin permanently such picketing. The district court, after hearing evidence, dismissed the owners' suit, concluding that the court was without jurisdiction because of pre-emption by the National Labor Relations Board. The owners have appealed. We affirm the trial court's judgment of dismissal.

The basic facts of the case were established by stipulation or uncontroverted evidence. The vessels in question

carry cargo between United States ports and foreign ports. They do not carry cargo from one port in the United States to another port in the United States. The crews and officers of the vessels are foreign nationals. There is no labor dispute between the owners of the vessels and their crews or the foreign unions who represent them or on the foreign contracts under which they work. The picketing unions neither have nor claim the right to represent the crews, nor do they seek to obtain such right. None of the crew members are members of the picketing unions. The picketing has been peaceful and without violence or threat of violence.

Four pickets commenced picketing the Theomana at the Port of Houston on October 28, 1971, and four began picketing the Northwind the following day. Signs carried by the pickets bore the following message:

"ATTENTION TO THE PUBLIC

> The wages and benefits paid seamen aboard the vessel THEOMANA (NORTHWIND) are substandard to those of American seamen. This results in extreme damage to our wage standards and loss of our jobs. Please do not patronize this vessel. Help the American seamen. We have no dispute with any other vessel on this site." (Parenthesis added)

The signs bore the names of the picketing unions.

The pickets did not speak to anyone. When inquiry was made of them they handed out literature in the following language:

"TO THE PUBLIC

> American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.

American dollars flowing to these foreign ship owners operating ships at wages and benefits sub-standard to American Seamen, are hurting our balance of payments in addition to hurting our economy by the loss of jobs.

A strong American Merchant Marine is essential to our national defense. The fewer American flag ships there are, the weaker our position will be in a period of national emergency.

PLEASE PATRONIZE AMERICAN FLAG VESSELS, SAVE OUR JOBS, HELP OUR ECONOMY AND SUPPORT OUR NATIONAL DEFENSE BY HELPING TO CREATE A STRONG AMERICAN MERCHANT MARINE.

Our dispute here is limited to the vessel picketed at this site, the SS ".

This literature, too, had on it the names of the picketing unions.

The refusal of longshoremen and others to cross the picket lines resulted in damage to the vessels' owners which the unions agree is incalculable.

The first step taken to stop the picketing was the filing, in behalf of the owner of the Theomana, of a complaint with the NLRB charging the unions with secondary picketing. The next day suit was filed in behalf of such owner in the district court of Harris County seeking temporary and permanent injunction. The petition in that suit also alleged that the unions were guilty of secondary picketing. The complaint with the NLRB was voluntarily withdrawn by the complainant. The pleadings in the district court of Harris County were amended. Those pleadings as amended alleged, in behalf of the owners of both vessels, that the picketing by the defend-

ant unions was for the purpose of inducing the owners to breach their contracts with their crews and the foreign union representing those crews. It was alleged that such activity was in violation of Tex. Rev. Civ. Stat. Ann. art. 5154d, sec. 4 (1947) and was a tort under Texas law.

The unions answered to the suit filed by the owners, asserting the defenses that: (1) The jurisdiction over the subject matter of the dispute was pre-empted to the NLRB by the Labor Management Relations Act, 29 U. S. C. sec. 151, et seq. (1947). (2) The Norris-La-Guardia Act, 29 U. S. C. sec. 101, et seq. (1932), prohibited the granting of the injunction sought. (3) The activities sought to be enjoined were protected by constitutional guaranties of free speech. (4) Tex. Rev. Civ. Stat. Ann. art. 5154d, sec. 4 (1947), if applicable to their activities, would be unconstitutional. (5) The owners were without clean hands in that their conduct was contrary to the public policy of the United States to promote the merchant marine, as pronounced in 46 U. S. C. sec. 1101 and sec. 1241 (1970). The trial court sustained the first of those asserted defenses and did not make findings of fact or conclusions of law relating to the others. We shall likewise confine our discussions to the jurisdictional pre-emption question.

Since San Diego Building Trades Council v. Garmon, 359 U. S. 236 (1959), state jurisdiction in cases of labor disputes has been compelled to yield to the jurisdiction of the NLRB if the activities complained of are arguably either protected by section 7 or prohibited by section 8 of the NLRA as amended by the LMRA. The determination of whether activity in fact is or is not protected or proscribed by the statute is initially for the NLRB. Failure of the Board to determine the status of the activity does not pass jurisdiction to the state courts. After the

Garmon case state jurisdiction notwithstanding federal pre-emption rules is confined to (1) those cases involving libel, Linn v. United Plant Guard Workers Local 114, 383 U. S. 53 (1966), and other matters "deeply rooted in local feeling or responsibility", Garmon, supra; (2) cases in which jurisdiction has been ceded to the state by the NLRB by virtue of 29 U. S. C. sec. 160(a) (1959); (3) cases in which the disputed activity is a "merely peripheral concern" of the LMRA, Garmon, supra, (e.g., breach of contract, damages for wrongful expulsion from a union); (4) cases in which the NLRB refuses jurisdiction; and (5) those cases involving violence, e.g., International Union, Etc. v. Russell, 356 U. S. 634 (1958); International Ass'n of Machinists v. Gonzales, 356 U. S. 617 (1958); United Const. Workers, Etc. v. Laburnum Const. Corp., 347 U. S. 656 (1953); Youngdahl v. Rainfair, Inc., 355 U. S. 131 (1957); United Auto., A. & A. I. W. v. Wisconsin Emp. Rel. Bd., 351 U. S. 266 (1955). The courts of Texas have adhered to these principles. Ex Parte Dilley, 160 Tex. 522, 334 S. W. 2d 425 (1960); Carpenters & Joiners Local Union No. 1097 v. Hampton, 457 S. W. 2d 299 (Tex. Civ. App.—Tyler 1970, no writ).

This Court's primary inquiry, then, is whether the appellees' picketing here in question was arguably prohibited or protected under the LMRA (29 U. S. C. sec. 157 and sec. 158). As appellants point out, appellees' picketing carefully remained within the guidelines for permissible picketing on the premises of a secondary employer promulgated in Sailor's Union of the Pacific, 92 N. L. R. B. 547 and adopted in Local 761, Inter. U. of E., R. and M. Wkrs. v. NLRB, 366 U. S. 667 (1961). These principles, commonly referred to as the "Moore Dry Dock Rules", consider picketing of a secondary employer's

premises lawful primary activity when it meets these conditions:

(1) The picketing is strictly limited to times when primary employees are present at the premises of the secondary employer or at the common premises.

(2) The primary employer is engaged in his normal business at the picketed premises at the time of the picketing.

(3) The picketing is limited to places reasonably close to the locations on the premises where the employees of the primary employer are at work.

(4) The picketing clearly discloses that the dispute is with the primary employer alone.

(5) The primary employer has no separate place of business at which a reasonable opportunity is afforded to reach his employees by picketing.

In the instant case the evidence reveals that appellees picketed only when the vessels of the appellants, primary employers, were dockside. Secondly, when picketed the ships were being loaded and unloaded, part of the usual operation of cargo ships and the normal business of the primary employers. Moreover, the picketing was limited to the dock at which the vessels were berthed. Further, the signs carried by the picketers clearly restricted the picketing to the primary employer. And, the two ships were the only reasonably accessible places of business to which the unions could direct their attention and efforts. Accordingly, appellees were not engaged in a secondary boycott. No other violation of section 8 is intimated by the parties and none other appears from the record.

We must, then, consider whether appellees' conduct was arguably protected under section 7 of the LMRA.

Appendix B

Section 7 is in the following language:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title."

Peaceful picketing has repeatedly been held protected by this section of the NLRA (amended by LMRA, 29 U. S. C. sec. 157). Garner v. Teamsters, Chauffeurs and Helpers, Etc., 346 U. S. 485 (1953); Carter Carburetor Corp. v. National Labor R. Board, 140 F. 2d 714 (8th Cir. 1944); National Labor Relations Board v. Thayer Co., 213 F. 2d 748 (1st Cir. 1954); Edir, Inc. d/b/a Wolfie's v. Club & Restaurant Employees and Bartenders' Union Local No. 133, AFL-CIO, et al, 159 N. L. R. B. 72 (1966); Sears-Roebuck & Company v. Retail Store Employees' Union, Local 345, AFL-CIO, 168 N. L. R. B. 126 (1967). And see Cox, The Right to Engage in Concerted Activities, 26 IND. L. J. 319 (1951). The Supreme Court has expressly recognized that a union's peaceful picketing to protest wage rates below established area standards arguably constitutes protected activity under section 7. International Longshore. Local 1416 v. Ariadne Shipping Co., 397 U. S. 195 (1970), and cases cited therein. This is the now well-recognized "area standards" picketing.

One case is persuasive authority in support of the trial court's order of dismissal. In South Georgia Co., Ltd.

v. Marine Engineers Beneficial Ass'n., 44 CCH Lab. Cas. 26,269 (La. Dist. Ct. 1961) picketing of a foreign ship with a foreign crew by an American union to protest loss of jobs by U. S. seamen from use of that ship to transport cargo purchased by Indonesia under the Agricultural Trade Development and Assistance Act was held to be arguably protected by section 7 of the L. M. R. A.

In Ex Parte George, 163 Tex. 103, 358 S. W. 2d 590 (1962), vacated 371 U. S. 72 (1963), on remand 364 S. W. 2d 189 (Tex. Sup. 1963), an American maritime union which represented unlicensed crew members on American Oil Company vessels was involved in a labor dispute with that company. The union picketed the main gate and parking lot gate at a coastal refinery operated by a wholly-owned subsidiary of American Oil. Workers at the refinery were represented by a separate union. Despite a finding, supported by the record, that the union's purpose was to induce the violation of American Oil's existing contract with the refinery worker's union (a violation of Art. 5154d here in question), the U. S. Supreme Court held that the maritime union's picketing was arguably protected by section 7.

In this case with facts not so gross as those in Ex Parte George, there appears no persuasive reason to hold contrary to the Supreme Court's holding in George. In fact, appellants do not argue that the appellees' picketing is not of a character sufficient to fall within section 7's protection. Rather, they contend that the LMRA "does not extend to the maritime operations of foreign-flag ships employing foreign aliens, and that American union activity which affects the internal affairs of the ship and its foreign crew is not protected by the Act." Appellants base their contention on three cases: Benz v. Compania Naviera Hidalgo, S.A. 353 U. S. 138 (1957); McCulloch

v. Sociedad Nacional, Etc., 372 U. S. 10 (1963); and Incres Steamship Co. v. International Maritime W. U., 372 U. S. 24 (1963). All three of those cases involved foreign-owned and registered ships with alien crews under foreign articles. In Benz the crew members went on strike and their cause was taken up successively by three different American unions. In McCulloch an American union petitioned for certification as the representative of foreign crewmen and the NLRB ordered an election. In Incres an American union picketed as part of its campaign to organize foreign crewmen. In each case the Supreme Court held that the NLRA, as amended, does not apply to foreign-registered ships employing alien seamen. This is so because the NLRB's jurisdiction is based upon circumstances "affecting commerce" and the Court concluded that maritime operations of foreign-flag ships employing alien crewmen are not "in commerce" as that term is contemplated by section 2(6) (29 U. S. C. sec. 152(b) (1947)).

McCulloch and Incres were decided on the basis of Benz. In Marine Cooks and Stewards, supra, the Supreme Court, while involved in a construction of the Norris-LaGuardia Act, drew an important distinction between the facts in Benz and those in Marine Cooks. The Court noted that in Benz an American union, to which none of the alien crew members belonged, had a substantial, immediate interest in the "internal economy" of the ship. The Marine Cooks case involved facts essentially the same as now before us (except that picketing was by boat and not at the dock of consignee, although that was expressly threatened). Justice Black, speaking for eight justices (Justice Whittaker dissented on a separate issue), viewed the union members' interest there as being "in preserving job opportunities for themselves in this country," not in the "internal economy" of the foreign vessel. They were

picketing on their own behalf and not for the benefit of foreign employees. The opinion labeled the dispute as domestic even though the employer was foreign.

The Benz case was distinguished from a case factually identical to the present case on the basis of the distinction noted by Justice Black in Marine Cooks. South Georgia Co., Ltd., v. Marine Engineers Beneficial Ass'n, supra. The Court in South Georgia characterized Benz as involving only "an internal dispute on a foreign ship." In Madden v. Grain Elevator, Flour & Feed Mill Wkrs., Etc., 334 F. 2d 1014 (7th Cir. 1964) the Seventh Circuit rejected a union's contention that, based upon Incres, the NLRB lacked jurisdiction of a dispute involving union members' refusal to unload ships so as to compel their employer to cease doing business with a Canadian shipping company. In passing on a contempt order arising from a secondary boycott complaint, the Court found that no attempt was being made to apply the NLRA to "the internal management or affairs" of the vessels involved. In a subsequent chapter of the same dispute the D. C. Circuit sustained the finding of the Seventh Circuit that Incres was inapplicable. Grain Elevator, Flour and Feed Mill W., L. I. A., Loc. 418 v. NLRB, 376 F. 2d 774 (D. C. Cir. 1967). These cases construe the Incres case to hold not that the NLRB lacks jurisdiction of *any* "maritime operations" of a foreign ship and crew, but that the Board lacks jurisdiction over the "internal affairs" of a foreign ship and crew. This is a more narrow and precise area of activity and one which hints of exclusion of the usual elements of a cargo-carrying operation and focuses only upon crew-owner relations.

In 1970 the Supreme Court was presented with a case of union picketing to protest the substandard wages paid by foreign-flag vessels to American longshoremen in

American ports. International Longshore. Local 1416 v. Ariadne Shipping Co., supra. The question of pre-emption was squarely at issue. Lower courts had held no pre-emption because the NLRB lacked jurisdiction. McCulloch and Incres were the authority for that holding. The Supreme Court reversed and held that the longshore activities of American longshoremen were not within the maritime operations of foreign-flag vessels. The Court carefully pointed out that the construction of the federal statute in Benz, McCulloch and Incres,

> ". . . was addressed to situations in which Board regulation of the labor relations in question would necessitate inquiry into the 'internal discipline and order' of a foreign vessel . . .".

The Court concluded that the functions of the American longshoremen did not constitute involvement with the ships' "internal discipline and order". Application of American labor statutes to resolve a conflict over wages paid to American longshoremen thus would not interfere with the foreign ships' internal affairs. Consequently the longshoremen's operations were "in commerce" and could be subject to the board's jurisdiction.

There is still no clear statement of the Supreme Court's position as to whether the NLRB has jurisdiction of, as here, picketing by American *seamen* to protest substandard wages and conditions on foreign vessels. The picketing in the Ariadne case could not have been any less destructive to the cargo-carrying business of the ships than the protracted picketing and conflict in Benz. So, it seems that the terms "internal affairs" and "internal order and discipline" must refer to the relationship between crew and employer and not to the carrying-on of the business for which the vessel is employed (a matter between shipowner and shipper). This construction has

support in the language employed by the Court in the Ariadne case where the Court refers to the crucial term "internal affairs" of the foreign ship as affairs "which would be governed by foreign law," i.e., (see footnote 4) the foreign ships' articles. Ships' articles concern such matters as seamen's conduct and obedience, wages, seamen's liability for cargo damaged or embezzled, competency in performance of seamen's duties and airing of seamen's grievances. See, e.g., 46 U. S. C. sec. 713 (1946). The issue in McCulloch and Incres was representation of foreign seamen. In Benz it was picketing to support a strike by the foreign crewmembers. To allow American unions to intercede in those instances would clearly be to allow interference with the internal order, discipline and affairs of a foreign ship. In Ariadne the Court confronted a situation involving American workers hired by foreign ships to serve, not as seamen, but as longshoremen. As noted before, the Court held that the longshoremen's activities performed by Americans were not an element of the "foreign ships'" internal affairs.

Ariadne differs from the instant case in at least two respects. First, it dealt with longshoremen rather than seamen. Further, it concerned picketing in regard to wages to be paid to American workers who were employed by foreign employers. The casual connection between American longshoremen's duties and the foreign vessels is what excluded those functions from the reach of the term "internal discipline and order." The Court expressly reserved the question of longshore vork performed by foreign crewmen. But in this case there are no American residents employed by foreign ship owners. The protest is not directed to allegedly substandard wages paid by foreign shipowners to then-employed American seamen, but to allegedly substandard wages paid to foreign seamen, with a concurrent request to the public not to

patronize the foreign ships. There is no direct interference with the relationship between employer and crewmen. Any direct interference is between the consignee and the shipowner, or the shipowner and the stevedore company. The fact that appellees are seamen and not merely longshoremen cannot indicate greater involvement in the internal affairs of the ships because none are employed on those ships.

It is important also to note that the Court in Ariadne focused upon the effect of longshore work upon the ships' internal affairs and not upon the purpose and intent of the picketers. The purpose of the activity in question is not of controlling significance in deciding the question of jurisdiction of the activity. (See, e.g., Chief Justice Calvert's dissenting opinion in Ex Parte George, 358 S. W. 2d 590, 607). If the picketing intervenes in an alien crewmen's strike or strives to organize those crewmen it constitutes involvement with matters not "in commerce". If it but voices a complaint as to foreign wages and urges the public not to patronize foreign vessels it does not engage in matters outside of commerce. It is peaceful picketing, publicizing a labor dispute, of such a character that its validity is suggested by the Court's holding in the Marine Cooks case, supra. It is, at least arguably, a protected activity under section 7 of the LMRA. As such, it is an activity as to which the exclusive jurisdiction to determine its propriety has been preempted to the NLRB. Upon that basis the trial court properly dismissed the plaintiffs' suit for want of jurisdiction.

Affirmed.

/s/ Bert H. Tunks
Chief Justice

Judgment rendered, and Opinion filed May 17, 1972.

APPENDIX C

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Civil Appeals for the Fourteenth Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A. D., 1971, present BERT H. TUNKS, Chief Justice, and Associate Justices, John M. Barron and Sam D. Johnson.

No. 635

From Harris County

Trial Court No. 889,002

Opinion by Tunks, CJ

In the cause

WINDWARD SHIPPING (LONDON) LIMITED, et al

Appellants,

VS.

AMERICAN RADIO ASSOCIATION AFL-CIO, et al

Appellees,

---

the following order was rendered June 14, 1972:

"It is ordered that appellants' motion for rehearing be overruled."

Appendix C

I, THELMA MUELLER, Clerk of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas, at the City of Houston, hereby certify that the foregoing is a true copy of Court's order rendered herein by this Court in the above entitled and numbered cause as appears of record in Minute Book I, Page 381.

IN WITNESS WHEREOF, I hereunto set my hand and affix the seal of said Court at Houston this 13th day of December A. D., 1972.

THELMA MUELLER
Clerk

APPENDIX D

SUPREME COURT OF TEXAS

From Harris County, Fourteenth District.

No. B-3484.

WINDWARD SHIPPING (LONDON) LIMITED, et al.

vs.

AMERICAN RADIO ASSOCIATION AFL-CIO, et al.

October 4, 1972.

Application of petitioners for writ of error to the Court of Civil Appeals for the Fourteenth Supreme Judicial District, together with their motion to expedite the hearing of said application, having been duly considered, it is ordered that said motion be, and hereby is, granted, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, Windward Shipping (London) Limited et al., and their surety, Allied Insurance Company, pay all costs incurred on this application.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of the order of the Supreme Court of Texas

in the case of Windward Shipping (London), Limited, et al. vs. American Radio Association, AFL-CIO, et al., No. B-3484, From Harris County, Fourteenth District, as the copy of such order appears in the minutes of said Court under the date of October 4, 1972.

IN TESTIMONY WHEREOF, Witness my hand and the Seal of the Supreme Court of Texas, at the City of Austin, on this 5th day of December, 1972.

GARSON R. JACKSON
Garson R. Jackson,
Clerk

APPENDIX E

PARAGRAPH VII OF DEFENDANTS' ANSWER TO PLAINTIFFS' FIRST AMENDED PETITION FOR INJUNCTION, FILED NOVEMBER 8, 1971:

VII.

Defendants would show that this Honorable Court may not grant the relief requested by the Plaintiffs herein because jurisdiction over the subject matter of this dispute and over the parties thereto does not lie within the province of this Honorable Court but is pre-empted to the National Labor Relations Board by the National Labor Relations Act (29 U. S. C. A. §151, et seq.). In this regard Defendants would show that Plaintiff Windward Shipping London Limited filed an unfair labor practice charge before the National Labor Relations Board on October 29, 1971, against all of the same parties who are Defendants here. (Case No. 23-CC-416, a copy of which is attached to this Answer).

APPENDIX F

FROM LABOR MANAGEMENT RELATIONS ACT,
29 UNITED STATES CODE:

§ 141. SHORT TITLE; CONGRESSIONAL DECLARATION OF PURPOSE AND POLICY

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. June 23, 1947, c. 120, § 1, 61 Stat. 136.

§ 151. FINDINGS AND DECLARATION OF POLICY

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the

intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and mem-

bers have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 136.

§ 157. Right of Employees as to Organization, Collective Bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

§ 158. UNFAIR LABOR PRACTICES

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that

at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain

with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the pur-

pose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an em-

ployer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract

or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor prac-

tice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to subsection (a) (3) of this section: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title. July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601; Sept. 14, 1959, Pub.L. 86-257, Title II, § 201(e), Title VII, §§ 704(a)-(c), 705(a), 73 Stat. 525, 542, 545.

TEXAS REVISED CIVIL STATUTES

ART. 5154d. PICKETING

Sec. 4. It shall be unlawful for any person, singly or in concert with others, to engage in picketing, the purpose of which, directly or indirectly, is to secure the disregard, breach or violation of a valid subsisting labor agreement arrived at between an employer and the representatives designated or selected by the employees for the purpose of collective bargaining, or certified as the bargaining unit under the provisions of the National Labor Relations Act.